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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

INTISAR KHALIF FARAH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 10, 2007

QUESTIONS PRESENTED FOR REVIEW

A. WHETHER ADMISSION OF EXHIBITS 2-1 THROUGH 2-6 FROM THE IMMIGRATION FILE OF KHALIF FARAH, PETITIONER INTISAR FARAH'S DECEASED FATHER, VIOLATED THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION WHERE KHALIF FARAH WAS NOT AVAILABLE TO TESTIFY AT TRIAL, KHALIF FARAH NEVER UNDERWENT CROSS EXAMINATION REGARDING THE DOCUMENTS AND EXHIBITS 2-1 THROUGH 2-6 ARE TESTIMONIAL?

B. WHETHER DISMISSAL OF THE INDICTMENT IS REQUIRED FOR THE GOVERNMENT'S PREJUDICIAL PREINDICTMENT DELAY WHERE THE GOVERNMENT KNEW ABOUT THE POTENTIALLY FALSE STATEMENTS THAT FORMED THE BASIS OF THE INDICTMENT IN 1998, DID NOT FILE THE INDICTMENT UNTIL 2005 AND OFFERED AN INADEQUATE JUSTIFICATION FOR THE DELAY IN LIGHT OF THE ACTUAL PREJUDICE SUFFERED BY INTISAR FARAH?

C. WHETHER THE GOVERNMENT FILED THE INDICTMENT OUTSIDE OF THE APPLICABLE STATUTE OF LIMITATIONS WHERE THERE ARE TWO STATUTES THAT

CRIMINALIZE THE SAME BEHAVIOR YET INEXPLICABLY HAVE DIFFERENT STATUTES OF LIMITATIONS AND THE RULE OF LENITY REQUIRES THE APPLICATION OF THE LOWER STATUTE OF LIMITATIONS PERIOD?

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JURISDICTION

The Appellant, Intisar Khalif Farah, appeals the memorandum opinion and order entered by the United States Court of Appeals for the Fourth Circuit affirming her conviction for violating Title 18, section 1425(a) of the United States Code, procuring naturalization unlawfully. On August 14, 2007, the United States Court of Appeals for the Fourth Circuit entered an order denying Ms. Farah's petition for appeal. Ms. Farah then filed a timely Petition for Rehearing and/or Rehearing *En Banc* on August 28, 2007, which the court later denied on September 11, 2007. Title 28, Section 1254 of the United States Code confers jurisdiction upon this Court to review on writ of certiorari the order entered by the United States Court of Appeals for the Fourth Circuit on August 28, 2007 denying Ms. Farah's Petition for Appeal and September 11, 2007 denying Ms. Farah's Petition for Rehearing and/or Rehearing *En Banc*.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall any person be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

8 U.S.C.S. § 1551 (2007)

There is created and established in the Department of Justice an Immigration and Naturalization Service.

18 U.S.C.S. § 3231 (2007)

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

18 U.S.C.S. § 1015 (2007)

Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens.

18 U.S.C.S. § 1425(a) (2007)

Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship.

28 U.S.C.S. § 1291 (2007)

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this *title [28 USCS §§ 1292(c)* and (d) and 1295].

Rule 803(6) of the Federal Rules of Evidence

A memorandum, report, record, or data compilation, in any form, of acts, events conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of the business activity to make the memorandum report, record, or data compilation, all as shown by testimony, of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12) or a statute permitting certification, unless the source of information or the method or circumstances or preparation indicate a lack of trustworthiness.

Rule 804(b)(4) of the Federal Rules of Evidence

Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

STATEMENT OF THE CASE

Pursuant to the government's factual assertions, the Appellant, Intisar Farah immigrated from Somalia to the United States in 1983 to study English under a student visa. (Appendix, pg. 3a.) On or about February 27, 1989, Ms. Farah submitted an application for asylum at a time of extreme civil strife and violence in Somalia. (Appendix, pg. 3a.) Later, on or about December 20, 1990, Ms. Farah applied for legal permanent residence status. (Appendix, pg. 3a-4a.) Finally, on January 31, 1995, Ms. Farah applied for naturalization and Ms. Farah became a naturalized citizen of the United States on April 20, 1995. (Appendix, pg. 5a.) Ms. Farah sponsored her brothers, sisters, parents, and husband, Yusef Abdi Ali, to enter the United States from Somalia. On December 8, 1996, Mr. Ali was admitted to the United States as an immigrant sponsored by a United States citizen, Ms. Farah. (Appendix, pg. 5a.)

At trial, the government presented evidence that, during her residence in the United States, Ms. Farah entered the banking industry and worked her way up from a teller to a management position. Ms. Farah gave birth to three children. Finally, Ms. Farah committed no violations of law, including criminal or even simple traffic infractions.

The government, during the mid to late 1990's, vigorously attempted to deport Ms. Farah's husband, Yusef Abdi Ali on two occasions, alleging that he committed war crimes as a member of the Somali National Army, many years before. The government was unsuccessful in both attempts to deport Mr. Ali.

Out of the Yusef Abdi Ali investigation however, the government began to scrutinize Ms. Farah's applications for asylum, legal permanent residence and naturalization, three years after she became a naturalized citizen. On or about December 1, 1998, an official of the former Immigration and Naturalization Service, ("INS"), authored a memorandum identifying what it deemed to be false statements sufficient to denaturalize Ms. Farah.[1] In

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[1] The trial court denied defense counsel access to the December 1, 1998 memorandum throughout the first and second trials and all post trial proceedings. The memorandum is held with the clerk of the Court of Appeals for the Fourth Circuit under seal.

The trial court rendered a virtually immediate decision to deny defense counsel access to the memorandum and exclude it from evidence at trial, without fully considering the relevance of the document to the case. Counsel for Ms. Farah argued that the INS memorandum related to Ms. Farah's motion to dismiss the indictment for prejudicial preindictment delay. The trial court quickly determined that because the government did not intend to use the document at trial, there was no need to produce the document. Ms. Farah requested to review the document at a motion's hearing. The trial court sharply denied the request in rendering its decision to deny the motion to dismiss for prejudicial preindictment delay without a hearing and advised defense counsel to simply question witnesses at trial about the prejudicial delay. Without basic information about the memorandum, however, Ms. Farah could not call the proper witnesses regarding the delay.

> Mr. Greenspun: Your Honor, we don't know what witnesses to call because we have not seen the memorandum
>
> Court: Okay

response to the 1998 memorandum, however, the government took no action against Ms. Farah at that time.

Following the two unsuccessful government prosecutions, in 2004, anonymous plaintiffs assisted by special interest group the Center for Justice and Accountability, filed a civil action against Mr. Ali in the United States District Court for the Eastern District of Virginia, alleging that Mr. Ali committed war crimes and torture while serving as a member of the Somali National Army.

As a result of the civil litigation, the Department of Homeland Security, ("DHS"), Immigration and Customs Enforcement, ("ICE"), division, began yet another investigation of Mr. Ali. The investigation quickly turned to his family, namely, Ms. Farah. In September 2004, the 1998 INS memorandum was forwarded to the United States Attorney who prosecuted Ms. Farah in both trials. At that time, the government again took no action against Ms. Farah.

Pursuant to Title 18, section 3231 of the United States Code on April 19, 2005, a grand jury returned an indictment against Intisar Khalif Farah

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Mr. Greenspun: We don't know the author or the recipient of the memorandum. We don't know what decisions the Government made in response to that memorandum about prosecuting or not prosecuting Mrs. Farah. In order to put her in jeopardy on that issue –

The Court: Counsel, I am denying it . . .

for procuring naturalization unlawfully in violation of Title 18, section 1425(a) of the United States Code. This indictment came one (1) day before the ten (10) year statute of limitations applicable to section 1425(a) expired. Ten (10) days after Ms. Farah's indictment, on April 29, 2005, the district court entered an order staying the civil case against Mr. Ali indefinitely until the political situation in Somalia improved. The indictment alleged that Ms. Farah,

> affirmed under penalty of perjury that the information in her then pending Application for Naturalization, INS form N-400, was true and correct. In fact, as the defendant then and there knew, the defendant had made several material [sic] false statements in the application in an attempt to cause the INS to approve her application.

The government later filed a Bill of Particulars, identifying the specific false statements in the Application for Naturalization, form N-400, that the government referenced generally in the indictment. The government stated that Ms. Farah provided two false statements on the N-400 form: (1) Ms. Farah falsely answered "No" to Part 3 of the form, which asks, "[h]ave you been absent from the United States since becoming a permanent resident?" and (2) falsely answered "No" to question 12(g) of Part 7 of the N-400 form, which asks, "Have you ever given false testimony for the purpose of obtaining an immigration benefit." (Appendix, pg. 5.)

The Bill of Particulars, also alleged that Ms. Farah made false statements in her application for permanent residence, Form I-485, filed on or about December 19, 1990. Specifically, the government alleged that Ms. Farah (1) falsely answered "yes" to Part A, question 3, which asks if she was an asylee eligible for adjustment of status, knowing that she obtained asylum from the false statement that she provided in response to her application for asylum, (2) falsely stated in response to Part B, question 11, that she last entered the United States on January 10, 1983 when she returned to the United States in 1984, and (3) falsely stated in response to question 26(Q) that she had not procured or attempted to procure a visa by fraud when she procured her asylee status by fraud. (Appendix, pg. 5.)

But the majority of the false statements alleged came from the application for asylum. Specifically, the Bill of Particulars alleged that, on the application for asylum, Ms. Farah (1) falsely stated in response to question 12 that her last arrival in the United States was January 11, 1983, when she traveled back to Somalia (2) falsely stated in response to question 30 that she was unwilling and unable to return to Somalia and she returned to Somalia after 1983 (3) falsely stated in question 32 that she would only return to Somalia after a democracy was established when she returned to Somalia after 1983 (4) falsely stated in response to question 34 that she was a member of the Isaaq clan of Somalia when she was a member of the Darod clan, (5) falsely stated in response to question 35 through 38 that she was persecuted for membership in the Isaaq clan when she was a member of the Darod clan, (6) falsely

stated in response to question 37 that her family was targeted by the Barre regime when they were not. In addition, the government alleged that the affidavit attached to Ms. Farah's application for asylum was false because it states that she is unwilling and unable to return to Somalia when she returned in 1984 and her original departure was in 1983. Further, the government alleges that Ms. Farah's claims of being imprisoned and tortured as an Isaaq are false because she was never mistreated and imprisoned and she is not an Isaaq.

The initial jury trial of Intisar Farah began on November 14, 2005 and continued for three (3) days until November 17, 2005. After deliberating, the jury determined that it was deadlocked and could not reach a unanimous verdict. The trial court, therefore, declared a mistrial on November 18, 2005 and scheduled a new trial for March 13, 2006. (Appendix, pg. 7a.)

During the first trial, the trial court made several evidentiary findings that are relevant to this appeal. Specifically, the trial court permitted government witness Dr. Lee Cassinelli to provide his expert opinion as to Ms. Farah's clan affiliation. Preliminarily, Dr. Cassinelli testified generally about Somalian clans and political history. The government then attempted to offer into evidence Exhibits 2-1 through and 2-6 from the immigration file of Intisar Farah's deceased father Khalif Farah. Ms. Farah objected citing *Crawford v. Washington*, 541 U.S. 36 (2004). The trial court admitted the Exhibits because it determined that the documents were not testimonial. Rather, the documents were

made under oath before any criminal proceedings arose against the Ms. Farah. (Appendix, pg. 7a.)

In the alternative, the trial court concluded that the Exhibits fell within the business records and personal and family history exceptions to the hearsay rule (*Id.*) The trial court concluded that the documents contain indicia of reliability because the statements made by Khalif Farah were made under oath and Exhibit 2-1 contained a photograph of Ms. Farah and identified Khalif Farah as her father. Expert Lee Cassinelli testified that Ms. Farah was a member of the Darod and not the Isaaq clan due to her father's purported clan affiliation listed on Exhibit 2-5.

Pursuant to Rule 31 of the Federal Rules of Criminal Procedure, the government decided to retry Ms. Farah. In anticipation of the new trial on March 13, 2006, Ms. Farah filed her renewed motion to dismiss the indictment for failing to return the indictment within the statute of limitations. On March 9, 2006, the trial court denied the motion. (Appendix, pg. 7a.) Later, on March 17, 2006 the jury returned with a verdict of guilty to Count I of the indictment. (Appendix, pg. 7a.) The trial court sentenced Ms. Farah to thirty (30) days of incarceration and post release supervision of one (1) year. (Appendix, pg. 8a.) The trial court entered a final judgment order on June 29, 2006, which was filed in the Clerk's office of the United States District Court for the Eastern District of Virginia on July 3, 2006.

Pursuant to Title 28, section 1291 of the United States Code, the final judgment order of the trial court is reviewable by the court of appeals of the circuit in which the district court proceeding was held. Accordingly, on June 28, 2006, Ms. Farah timely filed a Notice of Appeal in the trial court from the final judgment of the United States District Court for the Eastern District of Virginia, announced on June 22, 2006, pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure.

The judgment rendered by the District Court finding Ms. Farah guilty of naturalization fraud was affirmed by the Court of Appeals for the Fourth Circuit. First, the Court of Appeals found that the trial court did not violate the Confrontation Clause of the United States Constitution by admitting Exhibits 2-1 through 2-6 from the immigration file of Ms. Farah's deceased father, Khalif Farah. The Court determined that the statement were not testimonial. (Appendix, pg. 19a.)

Second, the Court of Appeals found that the District Court properly denied Ms. Farah's pretrial motion to dismiss the indictment for prejudicial preindictment delay. The court concluded that while Ms. Farah suffered actual prejudice because of the government's preindictment delay, the government provided an adequate explanation for the delay, namely that the Immigration and Naturalization Service employee that detected the alleged fraud could not criminally prosecute Ms. Farah. (Appendix, pg. 12a-15a.)

Third, the Court of Appeals found that the District Court properly denied Ms. Farah's pretrial motion to dismiss the indictment as outside of the statute of limitations because Title 18, Section 1425 of the United States Code is not ambiguous. (Appendix, pg. 8a-12a.)[2]

ARGUMENT

I. ADMISSION OF EXHIBITS 2-1 THROUGH 2-6 FROM THE IMMIGRATION FILE OF KHALIF FARAH, PETITIONER INTISAR FARAH'S DECEASED FATHER, VIOLATED THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION WHERE KHALIF FARAH WAS NOT AVAILABLE TO TESTIFY AT TRIAL, KHALIF FARAH NEVER UNDERWENT CROSS EXAMINATION REGARDING THE DOCUMENTS AND EXHIBITS 2-1 THROUGH 2-6 ARE TESTIMONIAL.

Neither this Court nor the Courts of Appeals have opined about whether immigration documents akin to Exhibits 2-1 through 2-6 from Khalif Farah's immigration file are "testimonial" and therefore inadmissible at trial where the alleged author of the

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[2] Upon the Court of Appeal's decision to deny the Petition for Rehearing and/or Rehearing en banc, the government renewed a previously filed motion to revoke Ms. Farah's citizenship. After hearing argument, the United States District Court granted the government's motion. While serving her sentence of thirty (30) days of incarceration, Ms. Farah was detained by Immigration and Customs Enforcement. While released on bond, Ms. Farah now faces removal from the United States.

statements is unavailable to testify at trial. In the present case, the government alleged that Ms. Farah lied on her Application for Asylum about her clan identity. At trial the government highlighted portions of Exhibits 2-1 through 2-6 stating that Khalif Farah, Intisar Farah's father, belonged to the Darod clan. Government expert Lee Cassinelli then testified that Somali clanship is a paternal determination, and therefore, Intisar Farah belonged to the clan of her father, the Darod clan, not the Isaaq clan, as she allegedly asserted on her 1989 Asylum Application. Based upon prior opinions of this Court, Exhibits 2-1 through 2-6 are testimonial and therefore, inadmissible at trial as Mr. Farah died in 1996 and was unavailable to testify at trial and Ms. Farah did not have a prior opportunity to cross-examine Mr. Farah about the Exhibits.

The primary question for this court is whether the statements contained in Exhibits 2-1 through 2-6 are testimonial. This Court held that the Confrontation Clause applies to "testimonial" statements and opined as to the definition of "testimonial" in *Crawford v. Washington*.

> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused--in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a

> formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement. Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,"; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

541 U.S. 36, 51-52 (2004) (internal citations omitted).

Following the *Crawford v. Washington* opinion, this Court applied the announced definition of a "testimonial" statement and opined as to whether statements made during a 911 call and during police

questioning at a crime scene are "testimonial." This Court held that statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Washington v. Davis*, 547 U.S. 813, 2274 (2006). Accordingly, the statements made at the crime scene were deemed "testimonial" while the statements made during the 911 call were not. *Id.*

This Court's analysis of "testimonial" statements in *Crawford* and *Davis* focused on traditional police interrogation scenarios. Applying the analysis in *Crawford* and *Davis* to a less traditional but common form of law enforcement interrogation, the statements contained in Exhibits 2-1 through 2-6 are testimonial. The documents describe family history and past events that support Mr. Farah's application for refugee status in the United States. Exhibit 2-2 suggests that Mr. Farah underwent an interview surrounding the document. (Appendix, pg. 27a.) Exhibit 2-3 is labeled "Interview Notes." (Appendix, pg. 29a.) This document appears to summarize the interview of Khalif Farah. The government did not offer evidence about the conditions under which the documents were generated. Finally, the primary purpose of the documents is to establish the events that led Mr. Farah to seek refugee status, which could certainly be used against him in any subsequent administrative or criminal prosecution related to the legality of the Farah family's presence in the United States. The present criminal prosecution of Ms. Farah serves as an example, where the government attempts to use

Exhibits 2-1 through 2-6 against Ms. Farah to prove that she lied on her Application for Asylum about her clan identity and therefore is not lawfully present in the United States.

To complete the analysis, this Court must also decide whether Mr. Farah was available to testify at trial and whether Ms. Farah had a previous opportunity to cross-examine Mr. Farah about his purported statements in Exhibits 2-1 through 2-6. As Mr. Farah was deceased at the time of trial, he was not able to testify. In addition, none of the evidence offered at trial indicates that Ms. Farah had a prior opportunity to cross-examination Mr. Farah regarding the statements. Based upon *Crawford* and *Davis*, the statements contained in Exhibits 2-1 through 2-6 are testimonial and therefore inadmissible as Mr. Farah could not appear for cross-examination at trial.

Exhibits 2-1 through 2-6 are not admissible to prove Mr. Farah's clan pursuant to any other rule of evidence. After concluding that Exhibits 2-1 through 2-6 are not testimonial, the Court of Appeals erroneously determined that the documents were admissible pursuant to Rule 803(6) of the Federal Rules of Evidence, the business records exception to the hearsay rule. The rationale supporting the business records exception is that such records are presumed reliable. "Reports and documents prepared in the ordinary course of business are generally presumed to be reliable and trustworthy for two reasons: 'First, businesses depend on such records to conduct their own affairs; accordingly, the employees who generate them have a strong motive to be

accurate and none to be deceitful. Second, routine and habitual patterns of creation lend reliability to business records.'" *Certain Underwriters at Lloyd's v. Sinkovich*, 232 F.3d 200, 204-05 (4th Cir. 2000).

Exhibits 2-1 through 2-6 contain several styles of handwriting, without an identified speaker. In addition, the origin of the documents is unknown; some appear to be prepared in the United States and some outside of the country. Exhibit 2-2 contains at least three handwriting styles and appears to be a copy of several portions of documents taped together. (Appendix, pg. 27a.) Exhibit 2-4 also contains several handwriting styles and does not seem to be connected or associated with any other document. (Appendix, pg. 31a.) The circumstances under which the documents were created are not known. In addition, the author of Exhibits 2-5 and 2-6 is unknown. (Appendix, pg. 33a and 35a.) When information provided in a document is offered by a person outside of the business or agency, the information may be excluded unless there is evidence that the recipient had adequate verification of the information provided by the outsider. *U.S. v. Turnbull*, 2000 U.S. App. Lexis 8618 (4th Cir. 2000). The government offered no evidence at trial that it took steps to determine and locate the author of the documents or verify the information contained in the documents. The trial court was, therefore, without evidence to identify the author or authors of the documents and determine that the documents were prepared in the normal course of business pursuant to a duty to report the information

In addition, Exhibit 2-1 through 2-6 were not kept in the course of a regularly conducted business duty. Documents made in the regular course of a regularly conducted business activity are deemed trustworthy because they are "routine reflections of the day to day operation of a business." *Palmer v. Hoffman*, 318 U.S. 109, 113-114 (1943) (upholding the exclusion of a train engineer's statement about an accident where the engineer died before trial. The Court concluded that the statement was properly excluded because it was made for litigation purposes and did not relate to the conduct of the railroad.) In this case, Exhibits 2-1 through 2-6 do not reflect the day-to-day operations of the Department of Homeland Security, formerly the Immigration and Naturalization Service. Rather, the documents detail the life experiences of Khalif Farah and the circumstances that lead him to seek refugee status in the United States. Because the documents are not routine reflections of the day-to-day operations of the government, the documents were not made in the regular course of a regularly conducted business activity.

Finally, the Court of Appeals also erred in opining that Exhibits 2-1 through 2-6 are admissible pursuant to Rule 804(b)(4) of the Federal Rules of Evidence, the family history exception to the hearsay rule. Rule 804 excepts the declarant's own statement regarding ancestry and other similar facts. The declarant of the statements contained in Exhibits 2-1 through 2-6, however, is unclear. The government failed to offer any evidence that Mr. Farah authored any of the Exhibits. In addition, as the government failed to present any witnesses who could testify

about the facts surrounding the creation of these documents, there is also insufficient indication of the origin of the information documented by Exhibits 2-1 through 2-6. Accordingly, Exhibits 2-1 through 2-6 are not admissible pursuant to Rule 804(b)(4).

The admission of Exhibits 2-1 through 2-6 from Khalif Farah's immigration file violates the Confrontation Clause of the Fifth Amendment to the United States Constitution as the statements contained in the documents are testimonial, Mr. Farah died in 1996 and was unavailable to testify at either trial of Ms. Farah and Ms. Farah did not have a prior opportunity to cross-examine Mr. Farah regarding the statements. Exhibits 2-1 through 2-6 are not admissible under any exception to the hearsay rule. The Court of Appeals for the Fourth Circuit, therefore, erred in affirming the trial court's admission of Exhibits 2-1 through 2-6.

II. DISMISSAL OF THE INDICTMENT IS REQUIRED FOR THE GOVERNMENT'S PREJUDICIAL PREINDICTMENT DELAY WHERE THE GOVERNMENT KNEW ABOUT THE POTENTIALLY FALSE STATEMENTS THAT FORMED THE BASIS OF THE INDICTMENT IN 1998, DID NOT FILE THE INDICTMENT UNTIL 2005 AND OFFERED AN INADEQUATE JUSTIFICATION FOR THE DELAY IN LIGHT OF THE ACTUAL PREJUDICE SUFFERED BY INTISAR FARAH.

The government's delay to prosecute Intisar Farah, during which time witnesses and documents critical to her case became unavailable and memories

faded, violates fundamental conceptions of justice or the community's sense of fair play and decency, requiring dismissal of the indictment.

Pre-indictment delay violates the due process rights of an accused where the accused first demonstrates that she suffered actual prejudice. "If the threshold requirement of actual prejudice is met, the court must then consider the Government's reasons for the delay, balancing the prejudice to the defendant with the Government's justification for delay. . . . The basic inquiry then becomes whether the Government's action in prosecuting after substantial delay violates 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.'" *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 403-04 (4th Cir. 1985) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). The determination of actual prejudice is to be made on a case-by-case basis. *United States v. Marion*, 404 U.S. 307, 324-26 (1971).

The Fourth Circuit Court of Appeals found actual prejudice to Ms. Farah due to the government's delay. Specifically, the Court of Appeals identified officials from the former Immigration and Naturalization Service who did not remember Intisar Farah or her application for asylum, when testifying at trial. Asylum officer Stanford Knight did not remember his interview with Ms. Farah. Department of State Official Mary Von Breisen did not remember the letter that she sent to the Immigration and Naturalization Service

concluding that Ms. Farah had a well founded fear of persecution. Both witnesses exercised hindsight analysis and speculation to testify about what must have occurred during Ms. Farah's interview regarding her application for asylum and what sections of the application were material to the decision to grant her application. (Appendix, pg. 13a.)

The Court of Appeals also identified prejudice caused by the missing file of Ms. Farah's attorney of record for her asylum proceeding, Allan Ebert, Esquire. Certainly any documents provided to Mr. Ebert and notes and memoranda of conversations or interviews with Ms. Farah, would offer time relevant confirmation about Ms. Farah's flight from Somalia, clan affiliation at the time of her departure and the specifics of her incarceration and persecution. All of Mr. Ebert's records regarding Ms. Farah's asylum request, however, are unavailable. Mr. Ebert represented Ms. Farah approximately seventeen (17) years ago, and all of the files and documents, computerized or otherwise, have been destroyed and no longer exist. (Appendix, pg. 13a.)

The government alleged that Ms. Farah was absent from the United States from April 1, 1990 to December 20, 1992, as she was living in Canada. To prove that Ms. Farah was in Canada during this time, the government offered the immigration file of Intisar Abdi Ali. The government alleged that Ms. Farah and Intisar Abdi Ali were the same person and argued that Ms. Farah lived in Canada from April 1990 to December 1992.

Ms. Farah attempted to obtain employment records from Les Gals K Street, Inc., a retail shop where she worked in the United States during the period of her alleged residence in Canada. Alan Harris, business co-owner of Les Gals K. Street, Inc., maintained records for all employees, including Ms. Farah. Such records contained hours and dates of Ms. Farah's actual work. Les Gals K Street, Inc., however, dissolved on March 24, 1994 and between 2000 and 2002, Mr. Harris destroyed all employment records. (Appendix, pg, 13a.) Mr. Harris did not rely solely on his records but also consulted the business accountant who maintained W-2 tax forms for employees of Les Gals K Street, Inc. Given the passage of time the accountant destroyed all records of Ms. Farah's employment as well. (*Id.*) The Court of Appeals identified the missing Les Gals documents, necessary to refute the government's allegations, another source of prejudice to Ms. Farah.

Ms. Farah suffered additional prejudice that the Court of Appeals did not recognize. Michael Comfort and Edward Newman, two Department of Homeland Security employees who never worked in the Washington D.C. and more specifically Virginia immigration offices, testified about the process of reviewing applications for asylum, legal permanent residence status and naturalization in absence of the officials that reviewed Ms. Farah's applications. Both identified information relevant to a grant or denial of an application. Once the government learned of potential inconsistencies in Ms. Farah's immigration applications as early as 1998, the government elected not to prosecute Ms. Farah until 2005. As a result of their decision, the witnesses who could best testify

about the matter were unavailable or lacked a sufficient memory of the events.

The court in *United States v. Glist* granted the defendant's motion to dismiss the indictment for prejudicial preindictment delay where the prosecution contained some of the same deficiencies in evidence caused by the delay present in this case. 594 F.2d 1374 (10th Cir. 1979). The prosecution in *Glist* charged the defendants with conspiring to underreport income and violate the tax laws. In the midst of the trial, the court granted the defendants' motion to dismiss for preindictment delay of three (3) years. Among the list of deficiencies caused by the prosecutor's delay, the court cited poor memories by the witnesses called to testify, that the government's files were scattered among different people in different offices, and the lead agent of the investigation was no longer with the Internal Revenue Service and available to testify at trial. The court concluded that "no citizen of the United States should be required to answer in a criminal courtroom to charges that are stale as these charges with conspiracy as board in scope as has been charged here. And that to compel such a trial is a denial of the constitutional rights of the accused." 594 F.2d at 1377.

Similarly, here, two Immigration and Naturalization Service employees that interviewed and processed Ms. Farah's immigration applications were unavailable at trial; one witness died and the other moved out of the country to an unknown location. Stanford Knight, the one Immigration and Naturalization Service employee present to testify

had no recollection of Ms. Farah or her application. Further, several documents necessary for Ms. Farah to counter the government's allegations are destroyed.

In light of the actual prejudice suffered by Ms. Farah, the government's lack luster explanation for the delay to indict Ms. Farah violates the fundamental conceptions of justice and the community's sense of fair play and decency and only enhances the need for dismissal of the indictment against Ms. Farah.[3] The government maintains that

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[3] This Court's decision in *United States v. Marion*, opines that prejudice to the defendant may be found where it is shown that the government delayed prosecution for nefarious motives or to gain a tactical advantage over the accused. Throughout both trials and in her petition for appeal, Ms. Farah alleged that the government maintained an ulterior motive for her prosecution. Specifically, Ms. Farah repeatedly stated that her prosecution came one day before the expiration of the ten (10) year statute of limitations, only after the government tried twice, unsuccessfully, to deport her husband Yusef Abdi Ali, and after the district court stayed a civil proceeding accusing Mr. Ali of war crimes. The notes of the government's own case agent Jason Manyx confirm the government's motive to prosecute Ms. Farah.

> [o]n November 12, 2004, ICE JTTF Agent Jason Manyx learned through open source materials that former Somali military officer, Yusef Abdi Ali, had become the subject to civil action in the Eastern District of Virginia. Various open source materials and court documents indicated Ali committed acts of torture; attempted extrajudicial killing, cruel, inhuman or degrading treatment or punishment; arbitrary detention; crimes against humanity; and war crimes. Given the

it did not prosecute Ms. Farah in 1998 because the Immigration and Naturalization Service attorney that drafted a memorandum detailing the supposed false statements in Ms. Farah immigration applications lacked the authority to prosecute.[4]

> various articles of the Immigration and Nationality Act deem one inadmissible/deportable ICS SA Manyx initiated an investigation into Ali's admission, background and immigration status. Investigation indicated that Ali's spouse Intisar Farah knowingly misrepresented facts before INS on January 31, 1995 regarding her absences from the United States and therefore was ineligible to become a naturalized citizen was directed by 8 C.F.R. 316,10 (b)(2)(VI) which requires a foreign national to be of good moral character.

[4] Despite the government's stated reason for delaying Ms. Farah's prosecution, it attempted to mislead the jury by implying, during closing argument, that the delay was caused by its ongoing investigation of the case, when indeed no investigation of Ms. Farah took place between 1998 and 2004. The government argued, "if we had charged her six weeks after the naturalization fraud, he would have then come to you and told you that we rushed to judgment." The government misled the jury into believing that the government was diligently investigating Ms. Farah and just happened to find sufficient evidence to prosecute her the day before the statute of limitations expired, when in fact the government failed to prosecute Mrs. Farah for ten (10) years from the date of her last allegedly false statements and seventeen (17) years since she filed her application for asylum, the origin of the majority of Mrs. Farah's allegedly false statements.

The government's statement was even more egregious because the government knew that the December 1, 1998 memorandum had been excluded from evidence and could not be used by Mrs. Farah to rebut the government's argument.

Indeed, pursuant to Title 8, section 1551 of the United States Code, the Immigration and Naturalization Service was part of the Department of Justice as was the United States Attorney's Office. Accordingly, the Department of Justice, a prosecuting agency within the federal government, possessed notice of Ms. Farah's allegedly false statements to initiate prosecution of Ms. Farah in 1998.

Even after the Assistant United States Attorney that prosecuted this case obtained the 1998 memorandum, identifying the specific statements by Ms. Farah that the government deemed false, the government continued to delay its prosecution of Ms. Farah until the day before the ten (10) year statute of limitations expired. The government offered no explanation for this delay. Further, the Court of Appeals did not address the government's failure to account for the delay between 2004 and 2005.

A recognized explanation for delay is the need for further investigation. In *United States v. Lovosco*, this court found that the prosecutor did not deprive the defendant of due process after a good-faith continuing investigation. 431 U.S. 783, 796 (1977). The government, however, did not contend that it was investigating the false statements.

Given the breadth of prejudice imposed upon Intisar Farah while the government delayed her prosecution between 1989 and 2005, without reason, the government violated fundamental conceptions of justice and the community's sense of fair play and

decency, depriving Ms. Farah of due process. Based upon the opinions of this Court and other circuit courts, the Court of Appeals' decision should be reversed, and the indictment of Intisar Farah, dismissed.

III. THE GOVERNMENT FILED THE INDICTMENT OUTSIDE OF THE APPLICABLE STATUTE OF LIMITATIONS WHERE THERE ARE TWO STATUTES THAT CRIMINALIZE THE SAME BEHAVIOR YET INEXPLICABLY HAVE DIFFERENT STATUTES OF LIMITATIONS AND THE RULE OF LENITY REQUIRES THE APPLICATION OF A LOWER STATUTE OF LIMITATIONS.

The rule of lenity required the government to indict Ms. Farah five (5) years after she allegedly made false statements on her Application for Naturalization in 1995. The offense charged in the Indictment, procuring naturalization unlawfully in violation of Title 18, section 1425 of the United States Code, has a ten (10) year statute of limitations period. In contrast, a violation for providing false statements in connection with an immigration matter in violation of Title 18, section 1015 of the United States Code, "Naturalization, Citizenship, or Alien Registry," Chapter 47 "Fraud and False Statements," has a five (5) year statute of limitations. A person can be prosecuted for making false statements within an immigration matter under both statutes. The statutory construction and legislative history of both statutes, however, offers no explanation for the disparity between the statute of limitations.

Given the unexplained disparity in the statutes of limitations period for sections 1015 and 1425 of Title 18 of the United States Code, the rule of lenity requires the five (5) year statute of limitations to govern the present case. The rule of lenity provides that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 347-48 (1971) (internal quotations omitted). The determination of whether a statute is ambiguous is not confined to the words of a statute, alone.

> In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. . . . Moreover, because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history [] is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.

Crandon v. United States, 494 U.S. 152, 158 (1990). Reviewing Title 18 offers no explanation for the differing statutes of limitations that apply to a charge

of making false statements to procure naturalization, punishable under sections 1015 and 1425.

Lenity requires the application of the five (5) year statute of limitations because of the nature of the government's case and the prejudice caused to Ms. Farah's defense by the government's conscious choice to prosecute Ms. Farah under section 1425, with a longer statute of limitations period. The gravaman of the government's case arises from Ms. Farah's allegedly false statements on her application for asylum. The Indictment returned on April 19, 2005 alleges that Intisar Farah made materially false statements under oath during her naturalization interview when she falsely affirmed that the information contained in her application for naturalization was correct. It is apparent from the face of the Indictment and Bill of Particulars that the government prosecuted Ms. Farah for making false statements, under oath, and not for naturalization fraud. Further, the government prosecution focused overwhelmingly on the statements made on Ms. Farah's application for asylum, as demonstrated by the allegations contained in the Bill of Particulars.

Pursuant to the rule of lenity, a five (5) year statute of limitations should have been applied to this case, such that the Indictment filed by the government on April 19, 2005 for false statements made in 1995 was filed outside of the statute of limitations. The Court of Appeals, therefore, erred in affirming the denial of Intisar Farah's motion to dismiss the Indictment.

CONCLUSION

This Court should grant this petition for writ of certiorari and reverse the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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